IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

RSA.No. 202 of 2006()

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AS.55/2003 of III ADDL.SUB COURT, KOZHIKODE

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: APPELLANTS/ LEGAL HEIRS OF 1ST APPELLANT AND 2ND APPELLANT/LEGAL HEIRS OF 1ST PLAINTIFF AND 2ND PLAINTIFF.

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1. S.VIMALA, W/O.KUMARAN, SRAMBIKKAL HOUSE, POST WEST HILL BHUT ROAD, ATHANIKKAL VEEDU, KOZHIKODE.

2. S.SUMANGALA, W/O.BALAN, MAYA NIVAS, THAYILPARAMBA, PO WEST HILL, KOZHIKODE.

3. S.URMILA, W/O.MURUKESAN, SRIVIHAR, KARUMANNUR, POST PARASSALA, THIRUVANANTHAPURAM.

4. S.PARTHAN, SRAMBIKKAL HOUSE,POST WEST HILL, BHUT ROAD, KOZHIKODE.

5. S.RAGHU, SRAMBIKKAL HOUSE, POST WEST HILL BHUT ROAD, KOZHIKODE.

6. S.RENUKADEVI, SRAMBIKKAL HOUSE, POST WEST HILL BHUT ROAD, KOZHIKODE.

7. S.KAIRALI, W/O.HARISH, KUTTIPUNATHIL THAZHATH VEEDU, POST KUTUVATTOOR, KOZHIKODE.

8. KARTHIYANI, D/O.IMBICHIKANDAN, W/O.METHALTHODI CHATHUNNI, KOTTOOLI AMSOM DESOM, KOZHIKODE TALUK.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS: RESPONDENTS/DEFENDANTS.

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1. SATHYABHAMA, W/O.NARANGALI THAYYIL DIVAKARAN, PADINJARE KURINJOLI, EDAKKAD AMSOM, PUTHIYANGADI DESOM, KOZHIKODE TALUK.

2. THILAKA DAS, S/O.DIVAKARAN, PADINJARE KURINJOLI, EDAKKAD AMSOM, PUTHIYANGADI DESOM, KOZHIKODE TALUK.

3. MOHAN DAS, S/O.DIVAKARAN, PADINJARE KURINJOLI, EDAKKAD AMSOM,'PUTHIYANGADI DESOM, KOZHIKODE TALUK.

4. THULASI DAS, S/O.DIVAKARAN, PADINJARE KURINJOLI, EDAKKAD AMSOM, PUTHIYANGADI DESOM, KOZHIKODE TALUK.

5. SOUPARNIKA, D/O.DIVAKARAN, PADINJARE KURINJOLI, EDAKKAD AMSOM, PUTHIYANGADI DESOM, KOZHIKODE TALUK.

6. NARANGALI THAYYIL CHOYIKUTTY, S/O.IMBICHIKANDAN, EDAKKAD AMSOM, PUTHIYANGADI DESOM, KOZHIKODE TALUK.

BY ADV. SRI.T.G.RAJENDRAN FOR R1 & R2

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 03/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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R.S.A. NO. 202 OF 2006

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Dated this the 3rd day of October, 2007

JUDGMENT

The legal heirs of deceased first plaintiff and second plaintiff in O.S.56/1999 on the file of Munsiff Court-I, Kozhikode are the appellants. Respondents are the defendants. 8th appellant,6th respondent and deceased first plaintiff and deceased Divakaran are the children of Imbichikandan. Respondents 1 to 5 are the legal heirs of deceased Divakaran. Plaintiffs instituted the suit for partition and separtion of their 2/4 shares in the plaint schedule properties alleging that they originally belonged to Imbichikandan who died on 31.1.1976. His widow died on 3.7.1988. It was contended that the properties devolved on plaintiffs, 6th respondent being their children and respondents 1 to 5 being the legal heirs of deceased son Divakaran. It was further contended that Imbichikandan was conducting

hotel business in the building constructed in plaint B schedule property and subsequently Imbichikandan purchased the property including the surrounding areas as per Ext.A1 document of 1952 and certain portion of that property was sold to one Hydrose and the remaining property is item No.1 of plaint B schedule property and after the death of Imbichikandan hotel business was being conducted by respondents and item No.2 of plaint B schedule property was purchased using the income derived from the business and it is also a joint family property and the properties in their joint possession and are to be divided between the legal heirs and appellants are entitled to get their 2/4 share separated. Sixth respondent in the written statement admitted the case of the appellants. Respondents 1 to 5 in their written statement contended that plaint schedule properties are not available for partition. It was contended that no hotel is existing in item No.1 of plaint B schedule property and the said item was not taken on lease

by Imbichikandan in 1952 as alleged and Imbichikandan has not constructed any house or any tea shop and the property belongs to respondents 1 to 5. It was contended that item No.1 of plaint B schedule property along with other properties were purchased by Divakaran and sixth respondent and they were in exclusive possession of the property and thereafter a portion of the property was sold to Hydrose and later sixth respondent relinquished his ½ right over the properties to Divakaran and Divakaran became the absolute owner and after the death of Divakaran the properties devolved on respondents 1 to 5 and hence properties are not available for partition. It was contended that plaint B schedule property was not purchased with the funds of the business as alleged and it is not available for partition.

2. Learned Munsiff on the evidence of PW1 and Exts.A1 to A3, B1 to B8 and C1 to C3(a) dismissed the suit holding that evidence establish that plaint schedule properties did not belong to

Imbichikandan as claimed by appellants. It was found that when examined as PW1 second appellant admitted that O.S.507/1957 was instituted against the father for realisation of the amount and in execution of the decree, property was put up for sale and one Korappan purchased the property in court auction sale. Relying on Ext.B4 sale deed dated 29.12.1969 it was found that Korappan assigned that property in favour of deceased Divakaran and sixth respondent and Ext.B4 proves after in court auction sale in E.P.692/1964, Korappan obtained possession of the property and Divakaran and sixth respondent became the absolute owners. Under Ext.B6, Divakaran and sixth respondent jointly assigned 12 ½ cents out of the said property in 1979. The remaining 27 ¼ cents were jointly held by them. While so under Ext.B7, sixth respondent released his right in favour of Divakaran. It was therefore found that Divakaran alone has right in the property. Under Ext.B8 Divakaran purchased item No.2 of the plaint B

schedule property in 1971 and so it is not available for partition. Suit was dismissed. Appellants challenged the decree and judgment before Sub Court, Kozhikode in A.S.55/2003. Learned Additional Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. Learned counsel argued that trial court received Exts.B1 to B8, based on which appellants were non-suited, in violation of the mandatory provisions of Order VIII Rule 1 and Order XIII Rule 1 of Code of Civil Procedure and no leave was granted to receive the documents on the date when PW1 was examined and in such circumstance, courts below should not have decided the case against the appellants relying on Exts.B1 to B8. Learned counsel also argued that all those documents are sham documents which were not acted upon and

Imbichikandan was indebted to others and it is only to save the property, documents were created in the name of sixth respondent and Divakaran and appellants did not get opportunity to explain those documents and in such circumstance, the decree and judgment are to be set aside.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. True, Rule 1 of Order VIII mandates that the defendants have to anex the list of documents relied on to the written statement and if no such list was annexed, document shall not be received without the leave of the court. Order XIII Rule 1 (2) as then stood mandates that after the settlement of issues documents shall not be received without the leave of the court and court shall record reasons for doing so. Though it was argued by the learned counsel that trial court received Exts.B1 to B8 without granting opportunity to respondents to disprove the documents or

without an order to receive them as provided under Rule 1(2) of the Code, copy of the appeal memorandum of first appeal preferred by appellants and made available by the learned counsel does not show that any such plea was taken before the first appellate court. If in fact Exts.B1 to B8 were received by the trial court at the belated stage, without affording opportunity to the appellants to file objections or it was contended that the documents should not have been received or that they were received without specific order that should have been objected at least before first appellate court. Appellants are not entitled to take such a contention at this belated stage in the second appeal.

7. Moreover, Ext.B8 is the title deed in respect of item No.2 of the plaint schedule property which was executed on 14.9.1971. When item No.2 of plaint schedule property was sought to be partitioned on the ground that it is a joint family property which originally belonged to the

Imbichikandan and therefore it is available for partition, it is upto the appellants to prove that fact. But when Ext.B8 stands in the name of Divakaran it is futile to contend that it is available for partition. Without producing any document to prove the right and when Ext.B8 title deed establish that item No.2 of plaint schedule property did not belong to the deceased Imbichikandan but to deceased Divakaran, appellants cannot be heard to contend that they did not get opportunity to disprove Ext.B8. It is up to the appellants to prove that it is a property belonging to their father and so it is available for partition.

8. Similarly eventhough respondents were not examined, second appellant was examined as PW1. PW1 herself admitted that in court auction sale item No.1 of the plaint B schedule property was sold and was purchased by Korappan. Courts below relied on Exts.B4 assignment deed executed by Korappan who was the auction purchaser and held

that the property was sold by Korappan in favour deceased Divakaran and sixth respondent. When Ext.B4 establish that the property, which originally belonged to Imbichikandan was sold in court auction sale and was purchased by Korappan and from Korappan it was purchased by sixth respondent and deceased Divakaran and sixth respondent thereafter released his half right under Ext.B7 in favour of Divakaran. courts below were perfectly correct in holding that item No.1 of plaint schedule property was also not available for partition. In such circumstance, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

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W.P.(C).NO. /06

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JUDGMENT

SEPTEMBER,2006